DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 95-0625
Corporate Income Tax
For Years 1991, 1992, and 1993

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Corporate Income Tax – Liability of taxpayer for sales to out-of-state buyers.

Authority: IC 6-2.1-3-3;
45 IAC 1-1-119;
Associated Milk Producers, Inc., v. Indiana Department of State Revenue, 534 N.E.2d 715, 718 (Ind. 1989).

Taxpayer protests proposed assessments of Indiana gross income tax.

II. Tax Administration – Penalty

Authority: IC 6-8.1-10-2.1.

Taxpayer protests the assessment of a 10% negligence penalty.

STATEMENT OF FACTS

Taxpayer, an Indiana corporation, is engaged in the mining and sales of coal. The mined coal, in the transactions at issue, was sold primarily to utility companies. The majority of the coal was shipped by barge via the Ohio River to out-of-state utility companies (the buyers). Taxpayer delivered its coal to docks on the Ohio River (docks with Indiana situs) and then loaded the coal onto barges—barges hired by the buyers to transport *their* coal from taxpayer's docks to out-of-state locales. (Note: the contract between taxpayer and buyers specified shipment terms "F.O.B. barge.")

Audit characterized these transactions as "taxable outshipments" and included the sales proceeds in taxpayer's Indiana gross income. Taxpayer disagrees. Taxpayer contends

such transactions are properly characterized as "nontaxable outshipments" with the proceeds to be excluded from its Indiana gross income.

I. Corporate Income Tax – Out-of-state sales.

DISCUSSION

Taxpayer protests Audit's determination that proceeds from sales of coal shipped from a dock located in Indiana to out-of-state companies are subject to Indiana gross income tax. Audit determined the receipts from these coal sales were intrastate in nature and therefore, should have been included in taxpayer's Indiana gross income. Specifically, Audit found that since the underlying coal sales were consummated in Indiana, pursuant to IC 6-2.1-3-3 and 45 IAC 1-1-119(2)(b), the receipts were derived from "taxable outshipments."

IC 6-2.1-3-3, in limiting Indiana's statutory "interstate commerce" exclusion to only that which is constitutionally prohibited, provides the Department with the statutory authority to adopt a rather expansive definition of "intrastate commerce." To wit:

> Gross income derived from business conducted in commerce between the state of Indiana and either another state or a foreign country is exempt from gross income tax to the extent the state of Indiana is prohibited from taxing that gross income by the United States Constitution.

The Department, therefore, has promulgated regulations to distinguish "interstate" from "intrastate" sales. Specifically, Audit has relied on 45 IAC 1-1-119(2)(b), which defines one particular type of taxable outshipment as:

> Sales to nonresidents where the goods are accepted by the buyer or he takes actual delivery within the State. Sales will also be taxable if the goods are shipped out of state on bills of lading showing the seller, buyer or a third party as shipper if the goods were inspected and accepted, or when the sales were completed prior to shipment in interstate commerce. (Internal cites omitted.)

In concluding taxpayer's sales transactions were completed in Indiana, Audit assigned considerable weight to the shipping terms—"FOB barge"—adopted by the parties. Since each barge was loaded and then embarked from Indiana docks, Audit determined that these sales were completed in Indiana.

Taxpayer, in response, argues the FOB terminology used by the parties is not relevant for purposes of determining whether such receipts should have been included in taxpayer's Indiana gross income. Rather, taxpayer believes that since the coal was delivered to common carriers (the barges), and these barges subsequently transported the coal to the out-of-state buyers, such proceeds, pursuant to Indiana regulations, must be characterized as nontaxable outshipments. That is, the income from these sales represented receipts

derived from interstate commerce and should have been excluded from taxpayer's Indiana gross income.

Taxpayer offers an example of a nontaxable outshipment:

> Sales to nonresidents where the seller, upon receipt of a prior order and as part of the contract, ships the goods from a point within or without Indiana to an out-of-state destination. Such sales are exempt from taxation whether shipment is made by the seller in his own conveyance, by his contract carrier or by common carrier, and whether the shipment is made on bills of lading showing the seller, buyer or a third party as the shipper of record.

45 IAC 1-1-119(1)(a).

The following transaction also represents an example of a nontaxable outshipment:

> Sales to nonresidents, where the goods are picked up in Indiana by common carrier which was ordered to do so by the buyer, and delivered to an out-of-state destination.

45 IAC 1-1-119(1)(f).

But the fact that coal was shipped by common carriers from Indiana to the buyers' out-of-state locations, alone, does not mean these transactions represented nontaxable outshipments. Equally germane to the interstate/intrastate analysis is the existence, or lack thereof, of any indicia suggesting the sales were completed in Indiana—shipping terms notwithstanding. (See Associated Milk Producers, Inc., v. Indiana Department of State Revenue, 534 N.E.2d 715, 718 (Ind. 1989) where the Indiana Supreme Court, with reference to shipping terms, stated that "Indiana's Uniform Commercial Code is not controlling in determining passage of title for purposes of taxation….")

The Department notes that the interstate/intrastate commerce analysis hinges neither on the shipping terms adopted nor on the hire of a particular type of carrier. As the Indiana Supreme Court in Associated Milk observed:

> The Supreme Court has held that so long as a local transaction is made the taxable event and the event is separate and distinct from the transportation or intercourse which is interstate commerce, the tax will not run afoul of the Commerce Clause of the Constitution (cites omitted).

Id. at 717.

Despite these generalized caveats, the Department finds that taxpayer's sales of coal to out-of-state buyers represented nontaxable outshipments of goods. Conspicuously absent from the evidence at hand was any showing that taxpayer's sales of coal to its out-of-state buyers were, in fact, completed in Indiana. Additionally, no local "taxable event" could be identified that was "separate and distinct" from the interstate nature of these transactions.

Consequently, the proceeds from these sales are properly classified as "receipts derived from interstate commerce" and should be excluded from taxpayer's Indiana gross income.

FINDING

Taxpayer's protest is sustained.

II. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the imposition of a ten percent (10%) negligence penalty.

> If a person subject to the penalty imposed under this section can show that the failure to file a return, pay the full amount of tax shown on the person's return, timely remit tax held in trust, or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty.

IC 6-8.1-10-2.1(d).

Taxpayer has shown reasonable cause for not having paid all tax assessed by Audit.

FINDING

Taxpayer's protest is sustained.

PE/MR-010308